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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 39.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is reported at 146 Fed. (2d) 66. It appears at page 264 of the Transcript of the Record, and the order of said Court modifying the order of the National Labor Relations Board appears at page 283.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of the Judicial Code, Sec 240, as amended, 28 USCA, Sec. 347, and of the National Labor Relations Act, Sec. 10 (e), 29 USCA, Sec. 160 (e). The date of the decree entered by the Court below is January 11, 1945 (R. 284). Petition for Certiorari was filed in this Court on February 21, 1945 (R. 288), and the Order of this Court allowing certiorari was filed April 9, 1945 (R. 287).

III.

STATEMENT OF THE CASE.

This case was commenced by the National Labor Relations Board (hereinafter called the "Board"), which filed in the United States Circuit Court of Appeals, Eighth Circuit, pursuant to Section 10 (e) of the National Labor Relations Act (hereinafter called the "Act," the relevant provisions of which are set out in the appendix), its petition for enforcement of an order entered by the Board on December 17, 1943 (R. 45). The said order directed Petitioner to cease and desist from refusing to bargain collectively with St. Louis Joint Council, United Retail and Department Store Employees of America, affiliated with the Congress of Industrial Organizations (hereinafter called the "Joint Council"), as exclusive representative of the Petitioner's employees at its St. Louis store in two departments, Nos. 280 and 281, engaged in altering men's clothing sold at retail by the Petitioner, and affirmatively ordered the Petitioner to bargain collectively with the Joint Council as representative of said employees (R. 46). Said order in Par. 1 (b) thereof also directed the Petitioner to cease and desist from:

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act"; (R. 46).

The said order also provided for the posting of notices and that the Petitioner should report compliance to the Board.

The Petitioner operates a large department store which includes the main store, three warehouses and a customers' garage. The functions of the Petitioner are divided into more than 350 departments. There is only one pay roll for all the employees and there is no distinction between clerical and non-clerical, selling and non-selling employees. All employment and personnel policies are handled and directed by a central office. Generally the working conditions of all the employees are the same (Intervener's Exhibit 18, R. 174-5; admitted R. 92).

The petitioner has approximately 5,000 employees in St. Louis (R. 3). There are 30 to 40 employees in the two departments, 280 and 281 (R. 3, 24). The employees in these departments, which are sometimes called busheling rooms, make the alterations on men's and boys' clothing sold in the Men's and Boys' Clothing Departments of the store (R. 69). One of the departments, No. 280, is on the second floor balcony (R. 69) and is under the supervision of the manager of the Men's Clothing Department (R. 80). The other department, No. 281, is in the basement (R. 72) and is under the supervision of the manager of the basement Men's Clothing Department (R. 110). The relationship of the operations in these two departments to the operations of the store as a whole is shown by the detailed description of a sale of a suit of clothes, Company's Exhibit 2 (R. 178-183), which was introduced in evidence by consent of the parties (R. 144). This description shows the abso-

lute dependence of the operations of these two, as well as those of the other departments, upon the store operations as a whole. There are identical regulations for the entire store with reference to employment, transfer, promotion, salary increases, layoffs, discharges, discipline, leaves of absence, vacations, admissions to the building, pay roll computations, sick leave pay, advances on salaries, discounts, year-end bonuses, rules for the guidance of employees, group life insurance, group hosiptal insurance, Welfare Association membership, charge accounts, rest rooms, locker rooms, lunch rooms, hospital and library (R. 147).

No charge is made for the alterations in the two busheling room departments, but the services are furnished as a part of the sale of the merchandise. There are very infrequent exceptions in special sales of men's clothing in the basement when a charge is made for an alteration. **These departments are maintained for the purpose of fitting clothing sold in the Men's and Boys' Clothing Departments, and that is their sole function** (R. 147). Although the evidence showed that some degree of skill is required for the work in the busheling departments, this same skill is required for work in the other alteration rooms where women's clothing is altered and where fur garments are altered (R. 98, 104, 109, 110, 124, 132, 133, 138, 146, 148), and the Board so found with respect to the alteration of men's clothing and women's clothing (R. 11).

The Congress of Industrial Organizations* and the American Federation of Labor have been carrying on rival organizing campaigns among Petitioner's employees **in a store-wide unit.** These rival campaigns began long before, and have continued after, the filing of the petition for representation in this case (R. 5, 21, Int. Ex. 5, 9, 11, 12 and 15, R. 159-168, admitted R. 88).

*Although the Joint Council is the petitioning union in this case, the campaign has been carried on by Local 372, United Department Store Employees Union, CIO.

On November 6, 1942, Department Store Employees Union, **Local 372**, Affiliated with United Retail, Wholesale and Department Store Employees of America, CIO, filed with the Board a petition for investigation and certification of representatives pursuant to Sec. 9 (c) of the Act **in a store-wide unit** (Int. Ex. 17, R. 169, admitted R. 92). The American Federation of Labor intervened and, after a hearing, the said petition for representation was dismissed by the Board on December 24, 1942 (Int. Ex. 18; R. 172, admitted R. 92). In the decision the Board said:

> "The parties agreed on a company-wide unit, including the employees of the main store and the St. Charles Street warehouse, but excluding, in general terms, supervisory, managerial, executive, confidential, and temporary employees; employees who are covered by existing contracts; and the Spring Avenue warehouse employees."

The employees in departments 280 and 281 were included in the unit proposed by the union in that case as shown by the petition (R. 169), and as shown by the Union's Brief (Co. Ex. 1, R. 177-8, admitted R. 143), in which other departments were sought to be excluded because of special skills, but 280 and 281 were not. And it was stipulated in this case that in the prior case the union had filed an Exhibit 11 listing specifically the numbers of the departments it wished to include in the unit and that departments 280 and 281 were among them (R. 93, 94, 213).

The petition for investigation and certification, which proposed a unit of only two departments, in the case now before the Court was filed on March 13, 1943 (R. 3), soon after the dismissal of the petition filed by local 372 for a store-wide unit and without any abatement of the store-wide organizing campaign (R. 89, 97, 98). Local 372 claimed substantial membership throughout the store (R. 78) and its membership in departments 280 and 281 had

been continuous since September, 1942 (R. 96), when its Master Committee considered filing a petition for a separate unit composed of those departments but decided to continue organizing on a store-wide basis, which it still considers most desirable for the employees (R. 96-98). The petition in this case was not filed by **Local 372** but was filed by the **Joint Council** (R. 3), although this fact was not disclosed to the employees, but, on the contrary, the Union represented to the employees that the petition had been filed by Local 372 (Int. Exs. 9 and 11, R. 161-164, admitted R. 88).

The Board in its Decision and Direction of Election found the **Joint Council** had membership in the unit which was held to be appropriate (R. 9). This finding as to membership was based solely upon the certificate of the Board's Regional Director that said employees were members of the United Department Store Employees Union (R. 154-156) **but did not show that any employee was a member of the Joint Council.** The testimony of the witness Verderber, an employee in one of the busheling rooms and a member of the Master Committee of the union (R. 78), was that he did not know why the petition was filed by the St. Louis Joint Council (R. 94, 95) and he did not know that Local 372 was a member of the Joint Council until about a month before the hearing (R. 101) and that neither he nor, so far as he knew, any other employee had ever designated the Joint Council as their representative (R. 89, 90). The witness Boggs testified that he was a representative of the Joint Council and he described the council as follows:

> "The St. Louis Joint Council is an organization composed of all of the Local Unions and plants organized by the United Retail, Wholesale and Department Store Employees Union in the St. Louis area" (R. 106).

The authorization cards signed by the employees who were members of the Union did not refer to the Joint Council, but contained the following language:

> "I, the undersigned, hereby request and accept membership in the United Department Store Employees Union and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters pertaining to wages, hours, and other conditions of employment" (R. 155-6).

The Board, after finding that the Joint Council had membership, and presumably substantial membership, in the unit, directed the holding of an election, at which the only name on the ballot was that of the Joint Council (R. 24). Based on the result of that election, the Board on July 12, 1943, issued its certification that the Joint Council is the exclusive representative of all the employees in the unit pursuant to Sec. 9 (a) of the Act (R. 25). The Petitioner on July 19, 1943, notified the Joint Council that it would contest the said certification (Bd. Ex. 8, R. 194, admitted R. 185).

On Sept. 23, 1943, the Board issued its complaint (R. 28-31) and alleged that on and after July 8, 1943, the Petitioner had failed and refused to recognize the Joint Council as exclusive bargaining representative of the employees in the said departments 280 and 281 and had failed and refused to negotiate with the Joint Council as to wages, hours and other conditions of employment, and had thereby engaged in unfair labor practices within the meaning of Section 8 (5) of the Act (R. 30). The Board alleged, also, that on or about August 31, 1943, the Petitioner had taken steps unilaterally to secure the necessary approval by the National War Labor Board of an increase in the salaries of the employees in the said unit and had sought to undermine the Joint Council's majority representation in said unit by informing all employees in the

Petitioner's store that the Petitioner had taken such steps to secure approval of such salary increase and thereby, and by the refusal to bargain, Petitioner had engaged in unfair labor practices within the meaning of Sec. 8 (1) of the Act (R. 30, 31).

The evidence showed that on August 31, 1943, the Petitioner filed with the Wage and Hour & Public Contracts Division of the United States Department of Labor, as agent for the National War Labor Board, under the **Stabilization Act of 1942, 56 Stat. 765,** and **Executive Order 9250,** two applications for approval of a voluntary salary increase in the sum of $2.00 per week, for **all** its employees in St. Louis whose salaries were subject to the jurisdiction of the National War Labor Board, except those employees covered by closed shop contracts with certain unions (Bd. Ex. 9, R. 194-204, admitted R. 187). One of the said applications covered the employees of the Petitioner's Spring Avenue Warehouse and the other application covered the employees in the Petitioner's store and St. Charles Street Warehouse and its Patrons Garage (R. 195). The latter application sought approval of the salary increase for more than **4500 employees** (R. 196A). No specific mention was made in the application of the employees in departments 280 or 281, and none was required under the regulations of the War Labor Board **then in effect** which provided only that the application should state "whether or not there is a duly recognized collective bargaining agent (for any or all of the affected employees) which has not joined with the employer in the application." **Subsequently** this regulation was amended to include a certified bargaining agent as well as a duly recognized agent. [N. W. L. B. Reg., Sec. 802.54 (b), (3)]. However, the Petitioner, desiring to make a full disclosure of the facts, in the letter of transmittal stated:

> "The application which covers the employees at the store shows that we have Union contracts and

working agreements which cover certain craftsmen, including electricians, painters, carpenters and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C. I. O., claims to represent the employees in the busheling rooms of the Store, Departments 280 and 281, amounting to approximately 40 employees out of the total of 4,530 employees of the store, and has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application" (R. 195).

An announcement of the filing of the application was made by the Petitioner on September 1, 1943, over the public address system of the store (Bd. Ex. 10; R. 204-206, admitted 189). It made no specific mention of the employees in departments 280 and 281 but it stated:

"Famous-Barr Company has filed with the proper Government Bureaus voluntary applications to grant a two-dollar weekly salary increase to all full-time

regular and extra employes, selling and non-selling, including salespeople on straight commission, and proportionate increases to all short-hour regular and extra employes in the store and warehouses, with the exception of executives receiving over twenty-six hundred dollars per year, and a comparatively few employes whose salaries have been fixed by closed shop agreements" (R. 205).

A similar announcement appeared in Petitioner's store publication, known as "Store Chat," on September 3, 1943 (Bd. Ex. 11, R. 206A, admitted R. 192). In a later public address system announcement made September 11, 1943, only part of which was read into the record by the Board's Trial Attorney, the applications were mentioned and it was stated that they were pending but no reference was made to any particular employees who were covered by the applications (R. 189, 190).

At the time of the hearing before the Board on October 14, 1943 (R. 183), no action had been taken on the applications by the National War Labor Board and the record in this case does not show whether the Joint Council did or did not file with the War Labor Board objections to the inclusion of the employees of departments 280 and 281 in the application.

IV.

SPECIFICATION OF ERRORS.

(1) The Court erred in holding that the Board could place the name of the Joint Council on the ballot and, as a result of the election, could certify it as representative of the employees in two departments of Petitioner's store, when none of said employees were members of the Joint Council or had designated it as representative, but it had only some indefinite relationship with a local union in which a number of the employees were members and which had been designated as bargaining representative by such employees.

(2) The Court erred in holding that the Board could determine as appropriate a unit composed of two departments, out of 350 departments in Petitioner's department store, where the employees possessed some degree of skill, which, however, was not different from the skill required of employees of other departments doing the same kind of work, and where rival unions were conducting store-wide organizing campaigns and the petitioning union claimed substantial membership throughout the store and had announced that this was the first of a series of petitions and had publicly stated, "Where we will petition next depends upon only one thing. That is, which group is ready next."

(3) The Court erred in holding that the action of the Petitioner in filing and announcing its voluntary application to the National War Labor Board for approval of a $2.00 per week general salary increase affecting the salaries of more than 4500 employees in its St. Louis store and warehouses was an unfair labor practice, in violation of Section 8 (1) of the Act, where the union did not claim to be the representative of the employees except the 30 to 40 employees in two departments, and that claim was based upon a certification then being contested.

(4) The Court erred in holding that the action of the Petitioner in filing and announcing its voluntary application to the National War Labor Board for approval of a general salary increase to substantially all its employees sustained the inference and conclusion of the Board that such action undermined the Joint Council among the 30 to 40 employees for whom it had been certified as bargaining representative, and discouraged employees generally in their union affiliation, where there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the salary increase.

(5) The Court erred in ordering the enforcement of paragraph 1 (b) of the Board's order, as modified by the Court, and in failing to eliminate said paragraph 1 (b) of the Board's order or, at least, to modify it so that it would be limited to the alleged unfair labor practice found by the Board.

V.

SUMMARY OF ARGUMENT

(A) The Certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council as the only name on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in certifying the Joint Council and in ordering the Petitioner to bargain with it was arbitrary, unreasonable and capricious.

(B) The Board's determination in this case of the unit as appropriate for the purposes of collective bargaining was arbitrary, unreasonable and capricious, and casts an undue and unreasonable burden upon the Petitioner.

(C) The filing and the announcement of the Petitioner's application for approval by the National War Labor Board of the general salary increase for substantially all the Petitioner's employees was not an unfair labor practice under Section 8 (1) of the Act.

(D) Paragraph 1 (b) of the Board's Order, as modified by the Court and ordered enforced as so modified, is a blanket order restraining the Petitioner generally from violating Section 7 of the Act. This order is too broad.

VI.

ARGUMENT.

A.

The Certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council as the only name on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in certifying the Joint Council and in ordering the Petitioner to bargain with it was arbitrary, unreasonable and capricious.

Section 9 (c) of the Act states that the Board shall provide for an appropriate hearing whenever a question affecting commerce arises concerning the representation of employees. Pursuant to this section the Board by long-established practice has required a showing, satisfactory to it, that the petitioning union represents a substantial number of the employees in the unit found to be appropriate.

In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638, l. c. 641;
In the Matter of American Manufacturing Company, 41 N. L. R. B. 995;
In the Matter of Smith & Caffrey Co., 38 N. L. R. B. 90, l. c. 92.

Recognizing that procedure, the petitioning union here, **Joint Council**, alleged in its petition for certification that substantially more than 51 per cent of the employees in the unit had designated it as their representative for collective bargaining (R. 4). In the Decision and Direction of Election issued by the Board on June 16, 1943, the Board said that the petitioning union, **Joint Council**, would

in said Decision and Direction of Election be thereafter referred to as the "CIO" (R. 7). The Board then found that a statment of its Regional Director, introduced into evidence at the hearing, **"indicates the membership of the CIO"** in the unit thereinafter found appropriate (R. 9). The only portion of the record upon which the Board could base its said finding was the statement of the Regional Director which showed **no** membership in the **Joint Council**, but rather membership in **"United Department Store Employees Union"** (R. 154, 155).

The filing of the petition by the **Joint Council** was concealed from the employees and the union misrepresented the fact to the employees (even to the extent of incorrectly reproducing the official Board Notice of Hearing so that it showed Local 372, instead of the Joint Council, as the petitioning union) and repeatedly stated that the petition had been filed by Local 372, United Department Store Employees Union, which did have membership in the claimed unit (Int. Exs. 9 and 11, R. 161-164, admitted R. 88). The witness Verderber, a member of the Master Committee of Local 372, testified that he did not know why the petition for certification in this case was filed by the Joint Council (R. 94, 95) and that he had not, and so far as he knew no other employee had, designated the Joint Council as his representative (R. 89, 90). In the Opinion of the Court below it was said that Verderber "testified that at the time he signed the card he knew that Local 372 was a part of the Joint Council" (R. 267). The Court was in error. The witness testified that he signed the card designating Local 372 as his representative in September, 1942 (R. 77, 89), but he did not learn of its relationship to the Joint Council until about a month before the hearing on May 7, 1943 (R. 67, 101).

Possibly the petition filed in this case on March 13, 1943, was filed by the **Joint Council** in an effort to avoid the effect of the decision by the Board entered on De-

cember 24, 1942, in Case No. R-4580, 46 N. L. R. B. 36 (R. 172), dismissing the petition filed by **Local 372** for certification in a store-wide unit of employees at the Petitioner's store, and of the petition in that case in which Local 372 represented that it had been designated as the representative of more than 51 per cent of all the employees in such store-wide unit (Int. Ex. 17, R. 169, admitted R. 92). Whether or not that was the reason for filing the petition in this case by the **Joint Council**, the record shows that not one employee in the claimed unit was a member of the **Joint Council**, and not one employee had designated the **Joint Council** as bargaining agent. The finding by the Board that presumably a substantial number of the employees in the unit found by the Board to be appropriate were **members of the Joint Council** was not supported by any evidence and was directly contrary to the facts shown by the record. It is true that the Joint Council won the election held by the Board, but it is also true that **the name of the Joint Council was the only name on the ballot** (R. 24, 25) and was placed there by the Board with a completely unwarranted finding that it had a substantial number of members in the unit.

In the matter of **Corn Products Refining Co.**, 58 N. L. R. B. No. 263, the Board said:

> "The literature in question does not purport to be a statement by a Board representative, **and the fact that the name of the Association appeared on the official ballot and the Regional Director's announcements of the election constituted positive proof, brought home to every voter that this Board does recognize the Association as a legitimate labor organization**, contrary to the CIO's claim." (Emphasis supplied.)

How can the Board justify its certification of the Joint Council as the representative of all the employees in the

unit, based upon the result of an election held by the Board under an order which arbitrarily and contrary to all the evidence represented to the voting employees that a substantial number of the employees in the unit were members of the Joint Council, whose name was the only name placed on the ballot by the Board? This was not mere inadvertence on the part of the Board. The Petitioner specifically called the Board's attention to the error it had made by a Motion for Reconsideration (R. 14, 16), which was considered by the Board and overruled before the election (R. 22, 25).

In view of the claim of special knowledge and understanding of representation cases claimed by the Board and recognized by the courts; in view of the Board's obligation to be impartial; in view of the non-reviewability of the Board's finding of facts and even its inferences therefrom (if supported by "substantial" evidence); in view of the recent decision of the Circuit Court of Appeals, Fourth Circuit, in the case of **Madden v. Brotherhood and Union of Transit Employees**, 147 F. 2d 439, holding that there can be no court review of the Board's finding of company domination, if the finding is made in a representation case; and in view of the finality of the decision of the Board as to appropriateness of any unit unless it is arbitrary and capricious, it would at least seem to be required of the Board that it refrain from holding out to the employees that a substantial number of their fellow employees were members of the Joint Council, when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council. It is no answer to say, as the Court below said, that the Joint Council won the election by a very high percentage. The question is whether it can safely be said that this arbitrary and wholly unwarranted action by the Board did not influence the result of the election. Is it too much to ask that the Board refrain from consciously in-

fluencing the result of an election? Is it necessary further for the Petitioner to show the number of votes so influenced?

If the Board had held that it was justified in placing the name of the Joint Council on the ballot because of the record showing that a number of employees in the unit had signed cards authorizing the United Department Store Employees' Union to represent them, and the testimony of the organizer Boggs that the Joint Council is an organization composed of all the local unions and plants organized by the United Retail, Wholesale and Department Store Employees Union, CIO, in the St. Louis area, then we might challenge the correctness of the Board's opinion, but at least the employees would have had the benefit of a disclosure of the true facts by the Board. The Board chose, however, to hold the election on its order which contained the incorrect finding that the Joint Council had membership, and presumably substantial membership, among the employees. We submit that this action of the Board, taken consciously by the Board, destroys any presumption of validity which might otherwise attach to the Board's certification issued pursuant to Section 9 of the Act, and was arbitrary, unreasonable and capricious, and that the Petitioner was not obligated to accept the said certification issued by the Board with such disregard for the true facts shown by the record.

B.

The Board's Determination in This Case of the Unit as Appropriate for the Purposes of Collective Bargaining Was Arbitrary, Unreasonable and Capricious and Casts an Undue and Unreasonable Burden Upon the Petitioner.

Section 9 (b) of the Act authorizes the Board to decide in each case whether the unit shall be the employer unit, craft unit, plant unit or subdivision thereof. This authority

of the Board, however, is subject to the limitation that such designation of the unit by the Board shall not be arbitrary, unreasonable or capricious.

Pittsburgh Plate Glass Co. v. National Labor Relations Board (CCA 8), 113 F. 2d 698, aff'd 313 U. S. 146, 85 L. Ed. 1251;
National Labor Relations Board v. Delaware-New Jersey F. Co. (CCA 3), 128 F. 2d 130, 137;
National Labor Relations Board v. Clarksburg Pub. Co. (CCA 4), 120 F. 2d 976, 980;
Bussmann Mfg. Co. v. National Labor Relations Board (CCA 8), 111 F. 2d 783, 785;
National Labor Relations Board v. Lund (CCA 8), 103 F. 2d 815, 819.

The record here shows that it was not the purpose of the Joint Council to represent the employees in departments 280 and 281 as a separate unit for the benefit of those employees. The petition filed with the Board for the bushelmen's unit was merely a part of one of the two rival store-wide organizing campaigns. The CIO sought to have an election in a store-wide unit on its petition filed Nov. 6, 1942. It included departments 280 and 281 in the store-wide unit, although it carefully listed and excluded certain other departments. (R. 93, 94). Among the excluded departments were those which the CIO deemed to be crafts, but it did not so designate departments 280 and 281 (Co. Ex. 1, R. 177, 178, admitted R. 143). After that petition was denied the CIO said, with reference to the petition in this case:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Our plan is to organize these groups as nearly 100% as possible just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready. * * * Remember. This new plan in no way conflicts with our final goal of a

> 100% Union store. We believe this new approach may do the job faster. * * * Your department alone may compose a bargaining unit. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one Union in the store" (Int. Ex. 11, R. 163, 164, admitted R. 88).

A few days later it said:

> "We will also discuss filing more election petitions. Perhaps your department will be included in this discussion. * * * We want to proceed at Famous-Barr unit by unit, until the time comes when we can petition for the entire store. Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, R. 165, 166, admitted R. 88).

Substantial membership throughout the store is claimed by both the CIO (R. 78) and the A. F. of L. (R. 5, 6), and both are seeking to organize on a store-wide basis (R. 18-21, 89, 97, 98). A store-wide unit is considered to be the most desirable unit by the A. F. of L. (R. 5, 6), by the CIO (R. 98, 100), by the Petitioner (R. 9) and by the Board (R. 11). The Board, however, decided, and the Court below sustained it, that the small unit of two departments proposed in this case should be established on what the Board has developed as its "extent of organization" theory (R. 11, 268). The Board claims support for this theory in **National Labor Relations Board v. Hearst Publications**, 322 U. S. 111, and in **National Labor Relations Board v. Botany Worsted Mills**, 133 F. 2d 876 (CCA 3), certiorari denied 319 U. S. 751, and in **National Labor Relations Board v. Lettie Lee, Inc.**, 140 F. 2d 243 (CCA 9). None of those cases, however, supports the Board's decision in this case which approved the unit, not for the sake of the employees in the unit, but to aid one of two competing labor organizations conducting rival

campaigns in a larger unit. In the **Hearst Publications** case, this Court, referring to the "extent of organization" theory, said (p. 135):

> "This is done on the express theory that it is desirable in the determination of an appropriate unit to render collective bargaining of the company's employees an immediate possibility. No plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining."

In this case there is no geographical separation, and a plausible reason for awaiting organization on the basis of the admittedly more appropriate store-wide unit appears in the undisputed evidence that the attempt to set up the two departments as a separate unit was only a calculated step to gain an advantage in the organization of the whole store and was not motivated by a desire to give a present benefit to the employees of the two departments.

In the **Botany Worsted Mills** case a small unit was approved because there was not a substantial number of the remaining employees who belonged to any union; but in this case both the CIO and the A. F. of L. claim a substantial number of employees in a store-wide unit.

In the **Lettie Lee** case a small unit was approved because the other employees were not eligible to membership in the petitioning union, but in this case both the rival unions have solicited and admitted to membership employees throughout the store.

It was stipulated at the hearing that the United Retail, Wholesale and Department Store Employees of America, CIO, has contracts with a number of department stores throughout the United States, that in said contracts the busheling department employees are either included in the industrial unit with other selling and non-selling employees

or were excluded because they had been previously organized by another union, **but that said United Retail, Wholesale and Department Store Employees of America, CIO, has no contract for any busheling department as a separate unit in any department store in the United States** (R. 140-142).

The right of the employees to organize and to bargain collectively is guaranteed by the Act, but certainly nothing in the Act requires an employer to be subjected to a continuous series of campaigns and elections and bargaining conferences where, as in this case, the employer's business functions are divided into 350 departments, but all are merely component parts of one operation. The complete dependence of departments 280 and 281 on the operations of the remainder of the store is described fully in Company's Exhibit 2 (R. 178-183, admitted 144). This evidence showed that the two departments involved in this case could function only as a part of the store. They could not even build up a stockpile of work. They merely alter the clothing as it is sold in the selling departments in the regular course of business.

There was no reason for establishing any unit smaller than the store-wide unit, which all the parties and the Board agree is the appropriate unit, except as a matter of expediency on the part of one of the competing unions which believes that it will thereby gain advantage in reaching the ultimate goal of both unions to organize all the employees in a store-wide unit. The intention of the CIO to carry on its campaign unit by unit is evident from its published statements quoted above. And the Board by departing from its established policy has indicated that the Petitioner may not look to it for protection of the Petitioner's right to operate its department store without the long series of campaigns, elections and bargaining conferences planned and announced by the CIO.

In its Decision and Direction of Election the Board made the following finding:

> "The Company contends further that the unit now sought is inappropriate in that it fails to include employees in the women's alteration department whose skills are similar to the skills of the employees in the unit sought by the CIO. While we agree that the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms, the departments are in different sections of the store; there is historically a sharp demarcation between the trades involved; and it does not appear that there is a substantial interchange of personnel between the women's and men's departments. Traditionally, such workers have been represented by separate craft unions" (R. 11).

In the first sentence of this finding the Board incorrectly stated the Petitioner's position, which was that the fur alteration department, as well as the women's alteration department, employed the same skills as those in the men's busheling departments (R. 146). In the remainder of the above quotation from the Decision and Direction of Election, the Board set forth reasons for placing employees in two alteration departments in a unit separate from the employees in other alteration departments. The first of these reasons, that the departments are in different sections of the store, is specious, because **each of the two busheling departments is also in a different section of the store.** Department 280 is on the second floor balcony of the store (R. 69) and Department 281 is in the basement (R. 72); the women's alteration department is on the eleventh floor (R. 69). The next reason, "There is historically a sharp demarcation between the trades involved," is not supported by any evidence. The union's witness Verderber, an employee in department 280, had

worked on women's coats without difficulty (R. 98). The union's witness Scherer, business agent of the Amalgamated Clothing Workers, testified that in the only store in St. Louis under contract with his union which handles both men's and women's clothing, the same employees alter both men's and women's clothing (R. 104). The witness Weber, manager of the basement department 281, had previously conducted his own tailoring business and made and altered both men's and women's clothing (R. 109). And the witness Swartz, who is superintendent of work rooms at Scruggs-Vandervoort-Barney, another department store in St. Louis, Missouri, has charge of all work rooms in that store and constantly transfers employees back and forth. He testified:

> "Q. In your opinion, would a qualified tailor be able to do the work in a busheling room or in the women's alteration department just as well? A. I use them for both.
>
> Q. Is that the setup at Scruggs? A. Yes, sir.
>
> Q. You switch them back and forth as needed? A. Yes, sir.
>
> * * * * * * *
>
> Q. Does that also apply to the fur alteration room? A. Yes. I transfer people from that alteration room to the fur work room.
>
> Q. And from the fur work room to the men's or women's alteration rooms? A. That is right.
>
> * * * * * * *
>
> Q. Is the act of skill required to do one of these classes of work in one of the work rooms mentioned as great as it is in one of the other work rooms? A. You mean one kind of skill?
>
> Q. Yes, for the operator to go into one of the other rooms? A. I would say that is identical" (R. 132, 133).

The next reason given for making a distinction between the employees in the two alteration departments, 280 and

281, and the employees in other alteration departments is, "And it does not appear that there is a substantial interchange of personnel between the women's and men's departments." Verderber testified concerning transfers out of Department 280 to other parts of the store, including the fur work room (R. 74-77). And the witness McCarthy testified that there were cases of interchange of employees between the men's busheling room and the women's alteration department (R. 146, 150).

The last reason given for making a distinction between the employees of departments 280 and 281 and the employees of the women's alteration department is: "Traditionally such workers have been represented by separate craft unions." The witness Scherer, business agent for the Amalgamated Clothing Workers, testified:

> "Well, so far as the International Ladies' Garment Workers Union, it is an organization that caters more to the ladies' industry, such as dresses, underwear and so on. Our organization is more or less the men's clothing" (R. 103).

However, the testimony of this witness, as well as the constitution of the International Ladies Garment Workers Union, made it clear that the jurisdictional separation applies in the **manufacturing industries** (R. 225, 226, 231). The evidence in this case showed no such separate representation in **alteration departments of retail stores.** The Amalgamated Clothing Workers represents employees in the alteration department working on both men's and women's clothing in the only store in St. Louis it has under contract which sells both (R. 104), and Local 372, United Department Store Employees, CIO, has solicited not only the employees in the busheling rooms involved in this case, but also the employees in the women's alteration department (Int. Exs. 5 and 15, R. 160, 168, admitted

R. 88), and it included all such employees in its petition for a store-wide unit filed Nov. 6, 1942 (Int. Ex. 17, R. 169, admitted R. 92). In the case of **J. L. Brandeis & Son and Local No. 285 of the Amalgamated Clothing Workers of America, CIO**, 47 N. L. R. B. 614, the Amalgamated Clothing Workers petitioned for, and the Board ordered, an election in a unit composed of the employees engaged **in the alteration of men's, women's and boys' clothing.**

In the case of **The May Department Stores Co., d/b/a The May Company, and Retail Clerks' International Protective Association and Retail Textile Clerks, A. F. of L.**, 39 N. L. R. B. 471, l. c. 478, which involved the Denver store of the Petitioner, the Board said:

> "The Textile Clerks request that the seamstresses and furriers be included in its unit, but that tailors be excluded. The Company would include all three classifications of employees. Seamstresses perform alterations on ladies' clothing and millinery. Furriers alter and repair furs and are in charge of fur storage. Tailors are engaged in performing alterations on men's clothing. It is thus apparent that the duties of these employees are similar. The Textile Clerks would exclude the tailors for the reason that they are under the jurisdiction of another organization affiliated with the American Federation of Labor and that several, in fact, are members of that organization. However, the seamstresses and furriers are also eligible to membership in other labor organizations connected with the American Federation of Labor. We shall exclude the seamstresses, furriers and tailors from the Textile Clerks' unit."

Thus we see that the stated reasons of the Board for holding that employees in two alteration departments out of several such departments in the store constitute an appropriate unit are not supported by the evidence, but are, in fact, contrary to the evidence shown by the record,

and are proof of capriciousness, particularly since entirely opposite results were reached in the other cases cited.

This is not a case where the Board's decision is based upon its interpretation of facts in evidence, but is a case where there is no evidence to sustain any of the reasons given by the Board for establishing the claimed unit. The Board's action is contrary to its expressed standards for determining an appropriate unit, is contrary to its practice in similar department store cases and is contrary to its "extent of organization" theory, and consequently its action can only be considered as unreasonable and arbitrary.

It is evident from the record that the unit composed of the employees in departments 280 and 281 was not claimed by the union for the purpose of insuring to those employees their right to collective bargaining, but rather to gain an advantage in its campaign to organize the entire store, unit by unit, and to file a series of election petitions. In view of the fact that the record shows the Petitioner has over 350 departments in the store and there are two competing labor organizations undertaking to organize the employees of the store, the Petitioner submits that the Board's action was unreasonable, arbitrary and capricious. The disturbances to the store's operations and the ill feeling engendered among many groups of employees by rival campaigns in a long series of elections, each for the employees of one or two departments, would cause an undue and unreasonable burden upon the Petitioner. We submit that the Board's action in establishing this unit and directing an election therein and in ordering the Petitioner to bargain with the Joint Council as a result of that election was unlawful and void, and we submit that said order should not be enforced.

C.

The filing and the announcement of the Petitioner's application for approval by the National War Labor Board of the general salary increase for substantially all the Petitioner's employees was not an unfair labor practice under Section 8 (1) of the Act.

When the Petitioner filed with the National War Labor Board on August 31, 1943, its application for approval of a $2 per week general salary increase for more than 4500 employees in its store and adjacent warehouse and also filed an application for approval of a similar general increase for its employees in its Spring Avenue Warehouse (Bd. Ex. 9, R. 194-204, admitted R. 187), it was required either to include or exclude the 30 to 40 employees in the two departments 280 and 281 for which the Board had certified the Joint Council as representative. The Petitioner desired to obtain a court review of that certification and it was given the right to obtain such review by Section 10 of the Act. In order to preserve that right and not to render the propriety of the certification a moot question, the Petitioner could not bargain with the Joint Council for the 30 to 40 employees, but was required by the circumstances either to include them in the application with the 4500 other employees of the store or to exclude them. In that situation the Petitioner wrote a letter to the National War Labor Board (R. 194, 195) and filed it with the applications, and in the letter the Petitioner advised the War Labor Board of all the circumstances, including the certification and the fact that the Petitioner intended to contest the certification in Court and stated it was the Petitioner's intention to include in the application the employees of the two departments, 280 and 281, but if the Joint Council objected they could be excluded (R. 195). The Petitioner announced to its em-

ployees that the applications had been filed, but it made no specific mention of the employees in the busheling rooms.

The Board held that this conduct of the Petitioner was an unfair labor practice in violation of Section 8 (1) of the Act (R. 53). Its reasoning is shown by the Intermediate Report of the Board's Trial Examiner, which was adopted by the Board (R. 45), and which contained the following language:

> "The Board and the courts have uniformly held that unilateral action by an employer in the granting of a wage increase, where there is a duly constituted and existing bargaining representative of the employees affected, is in derogation of the union's right to recognition and representation in such matters. It logically follows that the respondent's action in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation" (R. 52).

No cases were cited by the Board in support of its conclusion.

The Court below sustained the said holding of the Board, and it said:

> A voluntary wage increase without collective bargaining when the employees are organized and have selected a bargaining agent may be found to be an unfair labor practice. **N. L. R. B. v. Christian Board of Publication**, 8 Cir., 113 F. 2d 678, 681, 683; **Wilson**

& Co., Inc., v. N. L. R. B., 8 Cir., 115 F. 2d 759, 763; **Singer Mfg. Co. v. N. L. R. B.**, 7 Cir., 119 F. 2d 131, 136, cert. den. 313 U. S. 595; **N. L. R. B. v. Barrett Co.**, 7 Cir., 135 F. 2d 959, 961; **Great Southern Trucking Co. v. N. L. R. B.**, 4 Cir., 127 F. 2d 180, 186, cert. den. 317 U. S. 652. Such unilateral action on the part of an employer is evidence of an intentional disregard of the National Labor Relations Act, and, in this case, it sustains the inference and conclusion of the Board that such action undermined the union among the employees for whom it had been certified as bargaining representative and discouraged employees generally in their union affiliation" (R. 272-273).

Now, the Board and the Court below found only that the Petitioner refused to bargain with the Joint Council pending judicial review of the certification, and that is all that could be found under the facts of this case. There was no evidence, and not even a suggestion, that the Petitioner filed the application for approval of a store-wide salary increase for **4500 employees** for the purpose of undermining the Joint Council among the **30 to 40 employees** in the two busheling departments. Such a suggestion would be absurd and no such claim has been made in this case. The only claim is that the Petitioner should have bargained with the Joint Council as the representative of the 30 to 40 employees in the busheling departments before stating its willingness to include those employees in the application along with the 4500 other employees. In other words, the claim is that the Petitioner refused to bargain with the Joint Council. If the Petitioner is correct in its position, heretofore stated, that the certification was invalid, then it was under no duty to bargain with the Joint Council and it has not engaged in any unfair labor practice. Assuming, however, for the sake of argument, that the Petitioner's position with respect to the certification is incorrect and that it was under a duty to bargain with the Joint Council,

then it has engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act, but the filing and announcement of the application to the National War Labor Board add nothing to the Petitioner's express refusal to bargain shown by its letter to the Joint Council dated July 19, 1943 (Bd. Ex. 8, R. 194, admitted R. 185), in which the Petitioner said:

> "In reply to your letter of July 8th, requesting that we bargain with you for the Bushelmen, you are advised that we decline to do so for the reason that we do not agree that your organization represents a majority of the employees within an appropriate unit, and we wish to preserve our full rights to question the recent decision of the National Labor Relations Board on that subject as we may see fit.
>
> "We also reserve the right to question the jurisdiction of the N. L. R. B. in the matter" * (R. 194).

That letter was sent immediately after the certification for the purpose of notifying the Joint Council that the Petitioner would contest the certification in the only way it could do so, which was by refusing to bargain. Under the Act a certification standing alone is not subject to review by the Courts, but judicial review of a certification can be obtained only by the respondent's refusal to bargain and the issuance by the Board of a cease and desist order. **American Federation of Labor v. N. L. R. B.**, 308 U. S. 401, 409. Therefore, on August 31, 1943, when the Petitioner filed with the National War Labor Board its application for approval of a storewide $2.00 per week salary increase for 4500 employees, its willingness to include in the application the 30 to 40 employees of the busheling departments added nothing to the fact that the

* At that time the jurisdiction of the National Labor Relations Board over a retail store had not yet been decided by this Court in the cases of: **National Labor Relations Board v. J. L. Hudson Co.** (CCA 6), 135 F. 2d 380, cert. denied Oct. 11, 1943, 320 U. S. 740; **J. L. Brandeis & Son v. N. L. R. B.** (CCA 8), 142 F. 2d 977, cert. denied Oct. 16, 1944, 89 Law. Ed. 56.

Petitioner had expressly refused to bargain pending a judicial determination of the validity of the certification. This is shown clearly by the cases cited in the opinion of the Court below.

In the case of **National Labor Relations Board v. Christian Board of Publication** (CCA 8), 113 F. 2d 678, the Court held merely that the granting of a wage increase was evidence of domination of an independent union. The Court said:

> "The wage increase, therefore, was certainly a relevant circumstance for the Board to consider in determining the question of respondent's domination and support of the Employees Committee."

In the case of **Wilson & Co., Inc., v. N. L. R. B.** (CCA 8), 115 F. 2d 759, the wage increase was mentioned only as evidence which with other evidence tended to sustain the finding that the company had refused to bargain with the union in good faith. The only finding was that the company had violated Section 8 (5) of the Act and the only order required the company to bargain collectively with the union.

In the case of **Singer Mfg. Co. v. N. L. R. B.** (CCA 7), 119 F. 2d 131, the wage increase was considered only as evidence which with other evidence tended to show a refusal to bargain in good faith and the Court refused to enforce any portion of the Board's order except the order under Section 8 (5) of the Act restraining the company from refusing to bargain and from any other conduct in any manner interfering with the union's efforts to negotiate.

In the case of **National Labor Relations Board v. Barrett Co.** (CCA 7), 135 F. 2d 959, the Court said:

"Announcing an increase in wages while negotiations are in progress, without prior agreement thereon by the union, is a violation of Section 8 (5) of the Act."

In the case of **Great Southern Trucking Co. v. National Labor Relations Board** (CCA 4), 127 F. 2d 180, the Court said:

"Similarly, Southern's action regarding wages and paid vacation concessions, two of the most important elements of the employer-employee relationship, without prior agreement thereon by the union and while negotiations were still in progress, constituted an obvious attempt to settle unilaterally matters with respect to which Southern was under a statutory duty to deal with the union. Such conduct itself constitutes a violation of Section 8 (5) of the Act."

Certainly under other circumstances the granting of a wage increase might constitute interference, restraint or coercion of the employees in the exercise of the rights guaranteed to them in Section 7 of the Act, but no such circumstances are present in this case. The Petitioner's willingness to include the employees of the busheling departments in the application for the storewide increase was not in any way conditioned upon the employees leaving the union and could not in any way interfere with their rights under Section 7 of the Act. In the announcements which followed the filing of the application for approval of the wage increase, no mention was made of these employees in the busheling departments and certainly no effort was made by the Petitioner to interfere with their relations to the Union.

In the case of **Medo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, this Court held that the granting of a voluntary wage increase without collective bar-

gaining when the employees were organized was an independent unfair labor practice under Section 8 (1)* as well as a violation of Section 8 (5) of the Act only because the increase was granted, in response to an offer of the employees, to induce them to leave the union. This Court said, p. 685:

> "Quite apart from the Board's finding of an unfair labor practice in petitioner's direct negotiations with its employees when they had not revoked their designation of the union, there can be no question but that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union, National Labor Relations Bd. v. Falk Corp., 308 U. S. 453, 460, 461, 84 L. ed. 396, 399, 400, 60 S. Ct. 307. This violation of § 8 (1) was in itself sufficient to support the Board's order to cease and desist. The words and purpose of §§ 7 and 8 (1) of the Act enjoin an employer from interfering with, or coercing, its employees in their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return."

That case is distinguished from the case at bar in that there were in that case direct negotiations between the employer and the employees as a result of which the employer granted a wage increase and the employees left the union. There were no such negotiations, nor any negotiations whatever, in the case at bar, and the salary increase was not conditioned in any way. Moreover, in that case the union represented all the employees, while here the Joint

* It is not important in this case that violations of Section 8 (5) of the Act have been held to be also technical violations of Section 8 (1), and in this brief we have not considered such technical violation of Section 8 (1), but only independent violations of Section 8 (1).

Council had been certified as the representative of only 30 to 40 out of more than 4500 employees for whom the salary increase application was filed. The language quoted above from the majority opinion has a reference to a footnote in which it is stated specifically that there was evidence to support the Board's finding that the purpose and the effect of the wage increase was to induce the employees to leave the union. The dissenting opinion is based upon a contrary interpretation of the facts. In that opinion it is said, page 700:

> "Consequently answer (3), which Medo gave, was the only one it could give consistently with the view that the employer should hold out no inducement to the employees to abandon the union. In effect it said simply: 'We are perfectly willing you should have the increase. But whether you have it through the union or without it is entirely your own business and we will not have anything to do with this.' Any other reply would have been a counter-proposal offering inducement to abandon or a rejection of all bargaining. The answer Medo gave was neither. It was merely accession to the employees' wishes, not 'inducement' or offer held out; and it was coupled with the clear indication, under the circumstances, that what the employees might do about the union was wholly their own affair and none of Medo's.
>
> "Accordingly, I think Medo gave the only possible answer consistent with the statute's requirements and purposes and the only one which afforded no substantial basis for finding either that it was refusing to bargain collectively or that it was interfering with the employees' rights of organization by offering inducement to get rid of the union."

In spite of the difference of opinion as to the facts in the Medo case, both the majority and the dissenting opinions hold as to the law that the granting of the wage increase was not in and of itself a violation of Section 8 (1) of the

Act, but the majority opinion held it was such a violation because it was conditioned upon the employees leaving the union; whereas, the dissenting opinion was that in the absence of such a condition there was no violation of the Act.

In the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. 2d 520, the majority of the Court said, p. 524:

> "We cannot agree with the concurring opinion filed here that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

In the case at bar the Petitioner's willingness to include the 30 to 40 employees of the busheling departments in the salary increase for more than 4500 other employees was neither the subject of any negotiation between the Petitioner and the busheling department employees, nor was it offered with any condition or intimation that said employees should leave the union. It is certainly true that the Petitioner did not negotiate with the Joint Council about this increase, but neither did it negotiate with the employees directly. It filed its application with the National War Labor Board and it notified the National War Labor Board that it was willing to include the busheling department employees unless the Joint Council objected, in which event the Petitioner was willing that those employees should be excluded. The increase was not a subject of bargaining with anyone. It was a voluntary store-wide increase to eliminate substandards of living and was not offered in lieu of bargaining for the busheling depart-

ment employees or any of the other 4500 employees. The Petitioner believed they were all entitled to the increase and wanted them to have it. It would have been manifestly unfair for Petitioner not to include the busheling department employees. The Joint Council was not thereby deprived of any credit to which it was entitled, for it had nothing to do with the voluntary store-wide increase.

The Petitioner believes that it was legally entitled to file its application with the National War Labor Board for approval of the general salary increase for substantially all its employees, on the ground stated in its application, "To eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials" (R. 196B), recognized as exceptions to wage and salary stabilization under **Executive Order 9250**. The Petitioner was then contesting the claim of the Joint Council to be the exclusive bargaining agent for the 30 to 40 employees of the busheling departments, and it realized that the union might object to either the inclusion or the exclusion of those 30 to 40 employees in the said application. Therefore, the Petitioner advised the National War Labor Board of all the facts and stated its willingness to have these few employees in departments 280 and 281 either included or excluded. Thus, the Petitioner made it possible for the employees in these two departments to obtain the benefit of the increase under the stabilization order, but also made it possible for the Joint Council to exclude those employees from the application if the Joint Council felt that its interests would be better served (as apparently the Board felt they would be) by excluding them.

The entire subject of the application for approval by the National War Labor Board of the store-wide salary increase shows absolutely no motive on the part of the Petitioner except a legitimate business purpose at a time of acute manpower shortage, and the exercise by the Peti-

tioner of legal rights in furtherance of that business purpose. There is no evidence and no room for an inference that the Petitioner intended to deprive the union of any credit or otherwise to injure it. The Court below in its opinion referred to the fact that the union filed its charge with the Board on September 3, 1943; and that on September 11, 1943, the Petitioner's vice-president made an announcement to the employees in which he referred to the application then pending, and said (R. 190):

> "We sincerely hope that nothing will occur which will delay, or obstruct or prevent this approval."

The Court apparently drew an unfavorable inference from the chronology of these events (R. 271). But the Court overlooked the fact that the Petitioner had no knowledge of the charge filed by the Joint Council at the time the Petitioner's vice-president on September 11, 1943, made his statement to the employees. Although the charge was filed with the Board on September 3, 1943 (R. 26), as stated in the opinion, the Petitioner was not advised of it until September 23, 1943, when the Board issued its Complaint and Notice of Hearing (R. 28-32).

None of the announcements made by the Petitioner relating to the store-wide salary increase contained any reference to the employees in departments 280 and 281. The record shows (R. 189, 190) that the Board's Trial Attorney offered in evidence only those portions of the announcement of Sept. 11 which were quoted in the opinion (R. 271). The Board's Trial Attorney omitted to read into the record the remainder of that announcement which would have explained the reason for the language used. Then in the Court below for the first time it was inferred that the reference was to the charge filed by the union. The remainder of the announcement, which the Board could have introduced, would have shown to what the

quoted language referred, but the Board chose not to offer the entire announcement. In any event, the record in this case shows that notice of the filing of the charge was not given to the Petitioner until Sept. 23, long after the announcement of Sept. 11.

The Joint Council did not represent, or claim to represent, the more than 4500 other employees of the Petitioner's store and warehouses who were entitled to receive this general salary increase. There certainly might have been a claim of discrimination if the Petitioner had applied for approval of the increase for all the employees except the employees in departments 280 and 281. Therefore, the Petitioner placed the entire situation, with all the facts, before the National War Labor Board and stated its willingness to have the employees of departments 280 and 281 either included or excluded. Certainly that action should not furnish any basis for a charge of bad faith. The Board claims that the Petitioner did not act in good faith because it did not bargain with the Joint Council for departments 280 and 281 before filing the application for the store-wide salary increase, but Section 10 of the National Labor Relations Act gives to the employer the right to obtain judicial review of the Board's orders. It is said that the certification was valid when issued and although subject to review, it could not be disregarded pending a review. **The difficulty with that position is that the certification cannot be reviewed in any other way than by refusing to comply with it. American Federation of Labor v. National Labor Relations Board,** 308 U. S. 401, 409, 84 L. Ed. 347, 352.

The decision of the Board and the opinion of the Court below appear to mean that there was nothing the Petitioner might do, if it wished to preserve its right to judicial review of the certification, in order to avoid engaging

in an unfair labor practice, except to refrain entirely from filing any application for approval of a salary increase for any or all of its employees. We submit that such position is untenable and we do not believe that there is anything in the Act which justifies the holding that an employer may not file an application with the National War Labor Board for approval of a general salary increase for over **4500 employees** merely because a union has been certified as the representative of **30 to 40 employees**, and the certification is then being contested in court, as provided by Section 10 of the National Labor Relations Act.

D.

Paragraph 1. (b) of the Board's Order, as Modified by the Court and Ordered Enforced as so Modified, Is a Blanket Order Restraining the Petitioner Generally From Violating Section 7 of the Act. This Order Is Too Broad.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, provides that Petitioner shall cease and desist from:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act." (Emphasis supplied to show the words which were added by the Court to the Order as originally issued by the Board.) (R. 283-285.)

Although the order as so modified by the Court is limited in its application to the employees in the two busheling departments, it remains a blanket order to cease and desist

from all violations of the Act with relation to those employees. As issued originally by the Board, it was a blanket order against the Petitioner without any limitation. As modified by the Court, it is limited to the employees of two departments, but remains a blanket order restraining all violations of the Act. There is nothing in the record and nothing in the opinion of the Court below which under the law supports the broad language contained in the order, either as originally issued or as modified by the Court.

In the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, the order sought to be enforced by the Board was for all practical purposes identical with the order in this case. This Court said:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
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> . . . . . .
>
> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Board found, and the Court below sustained its finding, that the Petitioner had engaged in an unfair labor practice in refusing to bargain with the Joint Council pending the decision of the Court below. Also the Board found and the Court below sustained its finding, that the Petitioner had engaged in an unfair labor practice in filing its application with the National War Labor Board for approval of the general salary increase to more than 4500 employees in its St. Louis store. If, contrary to Petitioner's contention, there was a duty to bargain, then Petitioner contends its action in filing the application for approval of the salary increase was no more than an additional refusal to bargain with the Joint Council pending judicial review of the certification. Assuming, however, for the sake of argument, that two distinct unfair labor practices—(1) refusal to bargain and (2) the storewide salary increase—have been found by the Board and sustained by the Court, there is still no justification for the broad language contained in paragraph 1 (b) of the order.

The record here shows only that the Petitioner exercised the right given by Section 10 of the National Labor Relations Act to have the Court review the decision of the Board. That review could be obtained only by refusing to bargain. Hence, with respect to the refusal to bargain, the Petitioner's unfair labor practice was the only practice it could follow to obtain a judicial review of the Board's order. With respect to the other alleged unfair labor practice, the store-wide salary increase, here, also, there was shown no more than the Petitioner's failure to accept the certification by the Board pending a judicial review of that certification under Section 10 of the National Labor Relations Act.

Nothing in the Petitioner's conduct would justify an order restraining other violations which bear no resemblance to the Petitioner's refusal to recognize the Joint

Council pending a court review of the certification and the effort to obtain War Labor Board approval of the general salary increase. Nothing in the Company's conduct is evidence of any danger that the Company would commit any unfair labor practices in the future, and the Board did not find that it was justified in anticipating any future violation of the Act from the course of the Petitioner's conduct in the past.

In the case of **National Labor Relations Board v. Mason** (CCA 9), 126 F. 2d 810, the Court sustained the Board's finding that the respondent had engaged in unfair labor practices in discharging eleven employees in violation of Section 8 (3) of the Act, but it ordered the elimination of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of **National Labor Relations Board v. Newark Morning Ledger Company** (CCA 3), 120 F. 2d 262, the Board found, and the Court sustained the finding, that the respondent discharged the president of the local union because of her activity in behalf of the union. The Board ordered the reinstatement of the employee with back pay and the Board's order also contained language practically identical with the language of paragraph 1 (b) of the Board's order in this case. The Court enforced the portion of the Board's order which required reinstatement and back pay, but it ordered stricken out the blanket portion of the order restraining the respondent from committing any act in violation of the statute, and the Court said:

> "It is, however, now settled that in the absence of any finding that the unfair labor practices actually engaged in by an employer have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future to interfere with the employees' right of self-organization and collective bargaining, the entry of a blanket order to

cease and desist from all violations of the act is not justified. National Labor Relations Board v. Express Publishing Co., 61 S. Ct. 693."

In the case of **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 F. 2d 131, the Court sustained the Board's finding that the company had refused to bargain with the union and also found that the company had given wage increases to the employees while refusing to bargain with the union. The facts in that case are not similar to the facts involved here, because there the company was not seeking a judicial review of the Board's order but was meeting with the union and not bargaining in good faith, as the Board found. However, the two alleged unfair labor practices of which complaint is made here, refusal to bargain and granting a unilateral wage increase, were present in the Singer Manufacturing Company case and there the Court ordered the elimination from the Board's order of language similar to the language contained in Paragraph 1 (b) of the order under review here. The Court said:

"In the interest of certainty administrative orders and judicial judgments should be limited strictly to disposition of only such issues as are actually presented. The language of Mr. Justice Stone, in N. L. R. B. v. Express Publishing Company, 61 S. Ct. 693, 700, 85 L. Ed. ..., decided March 3, 1941, as follows, is applicable: 'The National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board

than to a court. * * * An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate.'

"So here the order appropriately should go no further than restrain petitioner from refusing to bargain and from any other acts in any manner interfering with United's efforts to negotiate. The order will be modified as indicated and, as modified, enforced."

Other decisions of the Circuit Court of Appeals, Seventh Circuit, to the same effect are the cases of **National Labor Relations Board v. Swift & Co.**, 108 F. 2d 988; **National Labor Relations Board v. Burry Biscuit Corp.**, 123 F. 2d 540; and **National Labor Relations Board v. Stone**, 125 F. 2d 752.

And the Eighth Circuit, United States Circuit Court of Appeals, has also refused to enforce provisions similar to Par. 1 (b) of the Order here in the cases of **Wilson & Co., Inc., v. National Labor Relations Board**, 123 F. 2d 411, and **American Smelting and Refining Co. v. National Labor Relations Board**, 126 F. 2d 680.

There are several quite recent cases in which the Courts have refused to order enforcement of orders similar to Par. 1 (b) of the Order in this case. In the case of **National Labor Relations Board v. Walt Disney Productions, Inc.**, 146 F. 2d 44, the Court sustained the Board's finding that the respondent violated Sec. 8 (3) of the Act, but the Court refused to enforce the portion of the order similar to paragraph 1 (b) here, and said:

"This command is but a repetition of the statutory rights of employees which employers are bound to respect. The employer cannot by such a blanket order be put in danger of being hailed into court upon a citation for contempt for any subsequently alleged violation of the Labor Act without accusation and trial before the Labor Board.

"The (b) portion of the Board's order is not justified as it enjoins acts entirely unrelated to any unfair labor practice engaged in by respondent. National Labor Relations Board v. Express Publishing Co., supra, 312 U. S. 426, 433-438, 61 S. Ct 693, 85 L. Ed. 930; National Labor Relations Board v. Newark Morning Ledger Co., 3 Cir., 1941, 120 F. 2d 262, 269, 137 A. L. R. 849. We decline to order enforced that part of the Board's order marked 1 (b)."

In the case of **National Labor Relations Board v. Cowell** (CCA 9), 148 F. 2d 237, the Court held that the evidence supported the Board's findings that the respondent had engaged in conduct which amounted to independent violations of Sec. 8 (1) of the Act and had violated also Sec. 8 (3) and Sec. 8 (5) of the Act. The Court said:

"Paragraphs 1 (a), 1 (b), 1 (c), 1 (d) and 1 (e) require respondent to cease and desist from the unfair labor practices found to have been engaged in by respondent. These paragraphs will be enforced.

"Paragraph 1 (f) requires respondent to cease and desist from 'In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in section 7 of the Act [29 U. S. C. A., Sec. 157].' This, in effect, is a blanket order restraining respondent from violating the statute in any manner. We think such a blanket order unwarranted and decline to enforce it."

In the case of **National Labor Relations Board v. Gilfillan Bros., Inc.** (CCA 9), 148 F. 2d 990, the Court held that the evidence supported the Board's finding of violation of Sections 8 (2) and 8 (1) of the Act, but the Court

modified the Board's order by striking out the blanket provision similar to 1 (b) here.

In the case of **National Labor Relations Board v. Lipshutz** (CCA 5), 149 F. 2d 141, the Court held that the evidence amply supported the Board's finding that the respondent had engaged in unfair labor practices under Section 8 (1) of the Act by making anti-union statements and by threatening employees with economic reprisals, but the Court said:

> "Respondent complains that the cease and desist order of the Board is too broad; that it should order him only to cease and desist from the unfair labor practices of the kind found by the Board to have been committed by him. In this we concur. When sustained by the court, the order is in effect an injunction, hence it must be exact and specific in what it requires or forbids. Hughes Tool Company v. N. L. R. B., 5 Cir., 147 F. 2d 69, and authorities cited. The order requires the respondent to cease and desist from in any manner interfering with, restraining or coercing his employees in the exercise of those rights and those activities guaranteed to them in Section 7 of the Act. The order must be modified so as to limit its full effect to the restraint of the unfair labor practices found to have been committed by the respondent and other related unlawful acts. N. L. R. B. v. Express Pub. Co., 312 U. S. 426."

It seems plain that the decision of the Court below in ordering the enforcement of paragraph 1 (b) of the order is in conflict with the controlling decision of this Court and with the decisions of other Circuit Courts of Appeals, and is clearly erroneous. The action of the Court below in modifying the Board's order did not correct the error. It limited the application of the erroneous portion of the order to those employees in the two busheling departments, but it remains a blanket order restraining the Peti-

tioner from acts which it is not claimed that Petitioner committed. And there is no basis in Petitioner's past conduct to suggest that other violations of the Act should be anticipated. It is therefore respectfully submitted that paragraph 1 (b) of the Board's order, as modified by the Court, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

Conclusion.

It is respectfully submitted that the Decision and the Decree of the Court below should be reversed. The action of the Board in finding that the Joint Council had membership, and presumably substantial membership, among the employees when the evidence was all to the contrary, and in so conducting the election as to hold out to the employees that a substantial number of their fellow employees were members of the Joint Council when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council, was bound to have influenced the result of the election, and was arbitrary, unreasonable and capricious. The certification of the Joint Council therefore was unlawful and void.

The action of the Board in establishing a bargaining unit, composed of 30 to 40 employees in two out of several alteration departments, sought by the Union to gain an advantage in its campaign to organize the entire store, unit by unit, and to file a series of election petitions, where there are more than 350 departments in the store and there are two competing labor organizations undertaking to organize all the employees of the store, was unreasonable, arbitrary and capricious. Such action would cause an undue and unreasonable burden upon the Petitioner and was unlawful and void.

The action of the Board in finding that the Petitioner's application to the National War Labor Board for approval

of the general salary increase for approximately 4500 employees of the Company's store and warehouses, including the 30 to 40 employees in departments 280 and 281, was a separate violation of Section 8 (1) of the Act, was not supported by any evidence and the order of the Board made upon such finding was unlawful and void and should not be enforced.

The action of the Board, as modified by the Court below, in ordering the Petitioner to cease and desist from in any other manner interfering with, restraining or coercing its employees in departments 280 and 281 in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection, as guaranteed by Section 7 of the Act, was too broad and comprehensive in any event. Paragraph 1 (b) of the Board's order, as modified by the Court below, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

The Decision and Decree of the Court below should be reversed and the Court should be directed to enter an order denying enforcement of the Board's order or at least modifying such order so that it will conform to the law.

Respectfully submitted,

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APPENDIX.

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: **Provided,** That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice

thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).